IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD KEITH HANKINS,
Appellant.

No. 2 CA-CR 2017-0216
Filed December 5, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20161418001
The Honorable Casey F. McGinley, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

Joel Feinman, Pima County Public Defender
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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Richard Hankins appeals his convictions and sentences for three counts of sexual exploitation of a minor under the age of fifteen. He argues the trial court erred in refusing to sanction the state for a disclosure violation, redacting a portion of his statement to the police, denying his request for a necessity instruction, and illegally enhancing his sentences. For the reasons that follow, we affirm Hankins's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Hankins. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In January 2016, the Tucson Police Department received a tip that Hankins possessed child pornography on his computer, which led officers to secure and execute a search warrant on his home. Before searching the home, detectives spoke with Hankins in a police vehicle.

¶3 The lead detective advised Hankins of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and Hankins agreed to speak with him. When the detective told Hankins the police had received a tip that "there's been some stuff" on Hankins's computer and asked him if there was anything on his computer the police should know about, Hankins replied he had pictures of children on his computer. He admitted that he is attracted to children and that he possessed 200 or more sexually provocative pictures of children on his computer, some of which were explicit.[1] Officers searched the home and seized two computers and a cell phone, which contained videos and images of child pornography and child

[1]Hankins also told detectives they would find pictures of exploited children in his computer; he has had a problem with child pornography since 1996; he placed the child pornography in his computer; he collects child pornography posted by others on a file sharing site; and he knew that possessing pictures of exploited children was against the law.

erotica.[2] Hankins was charged with five counts of sexual exploitation of a minor under fifteen for the possession of three images and two videos of child pornography.[3] The trial court later dismissed the two counts associated with the videos, and a jury found Hankins guilty of three counts of sexual exploitation of a minor under fifteen for the possession of the three images.

¶4 The trial court found Hankins had been convicted of two counts of attempted child molestation in 1986, and concluded that attempted molestation of a child is a dangerous crime against children in the second degree, and, therefore, a predicate felony under A.R.S. § 13-705(Q)(2). Accordingly, the court enhanced Hankins's sentences under § 13-705(D), resulting in three consecutive twenty-one-year terms of imprisonment—the minimum sentence allowed by statute. This appeal followed and we have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶5 On appeal, Hankins argues the trial court erred by: (1) failing to impose sanctions against the state for a purported disclosure violation; (2) redacting statements in his interview with police that supported his necessity defense; (3) denying his request for a necessity defense instruction; and (4) using his prior convictions to enhance his sentence.

Sanction for Failure to Disclose

¶6 Hankins argues the state violated disclosure rules when, on cross-examination, the lead detective disclosed for the first time that he had analyzed the images to determine whether age regression technology may have been used to make the subjects appear younger. Generally, "[i]mposing sanctions for non-disclosure is a matter to be resolved in the sound discretion of the trial judge, and that decision should not be disturbed absent a clear abuse of discretion." *State v. Hill*, 174 Ariz. 313, 325 (1993). Because Hankins timely objected to the detective's testimony at trial, we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

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[2]The detective who analyzed the images and videos testified most were child erotica, which he explained were "images that portray children in sometimes compromising poses . . . but their genitals are not exposed."

[3]Hankins was also charged with two counts of possession of a firearm by a prohibited possessor, but those counts were severed from this case before trial.

¶7 During cross-examination, Hankins asked the detective if the images had been analyzed to determine whether age regression technology had been used to make the subjects of the photos appear younger. The detective responded that he had analyzed the images earlier that morning, and that he did not make a report or otherwise disclose he had conducted such an analysis. Hankins then asked the detective why he had not disclosed that he had done such an analysis, and the detective explained he had not thought to previously disclose it because there was no mention of age regression until Hankins's opening statement, which the detective heard the day before he testified.[4]

¶8 After the detective was excused, Hankins moved to strike the entirety of his testimony "on the basis of late disclosure" because his analysis of whether age regression was used on the images was not previously disclosed. The trial court asked Hankins if he had ever filed a disclosure statement indicating one of his potential defenses would be that age regression had been used on the images. Hankins conceded he had not filed such a disclosure, but argued age regression was encompassed in his general denial. The court denied the motion to strike, finding there was no disclosure violation because the first mention of age regression was made by Hankins in his opening statement, the general denial was insufficient to disclose his age regression defense, and there was no "merit in striking any of [the detective's] testimony much less the entirety of it."

¶9 Rule 15.1(b)(3), Ariz. R. Crim. P., requires the state to disclose "all existing original and supplemental reports prepared by a law enforcement agency in connection with the charged offense." The state's "disclosure obligation extends to material and information in the possession or control" of any law enforcement agency or person who participated in the investigation of the case. Ariz. R. Crim. P. 15.1(f)(2), (3). Here, it is undisputed that the state did not disclose that the detective had analyzed the images before he testified or that he concluded age regression was not used on the images. However, even were we to assume that the state violated Rule 15.1(b)(3), any error by the trial court was harmless.[5]

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[4]In opening, Hankins's counsel asserted: "You can have a photograph of a young adult and you can age down the person to a degree that it appears to be a child. The police have the tools to see if something like this was done to those files. They failed to do it . . . ." The detective did not make any reference to age regression during his direct examination.

[5]The disposition of this matter does not require us to determine definitively whether a disclosure violation occurred.

¶10 "'Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *State v. Anthony*, 218 Ariz. 439, 446 (2008) (quoting *State v. Bible*, 175 Ariz. 549, 588 (1993)); *see also Henderson*, 210 Ariz. 561, ¶ 18. Hankins argues "it cannot be said beyond a reasonable doubt that the error did not contribute to the verdict" because without the detective's testimony about whether age regression was used, "the jury, on its own, could reasonably have concluded that the images may have been altered and that the State failed to prove that element [of the subjects being children]." We disagree.

¶11 Notably, Hankins presented no affirmative evidence suggesting that age regression technology had been employed to alter the images here, even though he was equally entitled to secure an expert to evaluate them. Nor did Hankins present any evidence suggesting that such alteration is sufficiently common that there was a significant possibility it had occurred here. And, although Hankins had no duty to present any evidence in his defense, the jury, and this court on review, is entitled to give unsupported speculation about the possibility of alteration the evidentiary weight that it deserves. In view of the overwhelming evidence of Hankins's guilt, including his multiple admissions that he possessed child pornography, we do not believe any error by the trial court addressing the disclosure issue contributed to or affected the verdict. *State v. Lizardi*, 234 Ariz. 501, ¶ 19 (App. 2014) ("We may find an error to have been harmless when there is overwhelming evidence of a defendant's guilt."); *see also State v. Davolt,* 207 Ariz. 191, ¶ 64 (2004) (erroneous admission of crime scene photographs and videotape harmless in light of overwhelming evidence).[6]

Redacted Statements and Necessity Instruction

¶12 Hankins also contends the trial court erred in redacting portions of his interview with detectives and denying his request for a jury instruction on necessity. "We review a trial court's ruling on the admissibility of evidence for an abuse of discretion and will reverse such a ruling only upon a finding of clear prejudice." *State v. Fischer*, 219 Ariz. 408, ¶ 24 (App. 2008). Similarly, we review a trial court's denial of a jury instruction for an abuse of discretion, *State v. Bolton*, 182 Ariz. 290, 309 (1995), but we independently assess whether the evidence supported a

[6]Further, we are not aware of any authority requiring the state to prove that age regression alteration has not occurred. *Cf. State v. Marshall*, 197 Ariz. 496, ¶ 21 (App. 2000) ("Although expert testimony may help to establish a child's age, ordinary people routinely draw upon their personal experiences to estimate others' ages based upon appearance.").

necessity instruction, *see State v. Almeida*, 238 Ariz. 77, ¶ 9 (App. 2015). "When a trial court refuses a jury instruction, we view the evidence on appeal in the light most favorable to the proponent of the instruction." *Id.* ¶ 2.

¶13 Before trial, the court precluded evidence of Hankins's two prior convictions for attempted child molestation, but warned it could become relevant if Hankins testified that he possessed the images out of necessity. The court then instructed the state to redact the statements in Hankins's interview with detectives that referred to the prior convictions, and also indicated that the statements in which Hankins explained why he possessed the images were admissible. At trial, Hankins objected to the redaction of the following statements he made after he told the detective he was attracted to children in terms of his "fantasies at home":

> Hankins: I don't think it outside [in] public, nothing. I mean, I . . .
>
> Detective: Yeah. Gotcha (ph).
>
> Hankins: That's one (1), that's one (1) reason why I haven't had any problems is I said I'll never let it happen again . . .
>
> Detective: 'Kay.
>
> Hankins: . . . but I do what I do in my house own . . .
>
> . . . .
>
> Hankins: . . . I mean I figured what's gonna (ph) happen the worse if I, eh (ph), if I live my life in my house.

Hankins argued these statements should be admitted because they support his necessity defense. The court, however, found the redacted statements in question were not only irrelevant, but that they did not support a necessity defense. Later, during the trial, Hankins argued for a necessity instruction and the court denied his request after finding there was no evidence to establish that he "had no reasonable alternative" other than to possess the images.

¶14 On appeal, Hankins contends "the redacted statements explained the reason why [Hankins] admittedly possessed the images on his computer, making them both relevant and admissible under the rule of completeness." He further argues the redacted statements give context to

his assertion that he "has constant urges" but "keeps those urges in his house," and that those statements establish the "slightest evidence" needed to give a necessity instruction. The state argues the redactions were proper because they protected Hankins's prior convictions from being revealed to the jury and that the redacted statements are irrelevant because they do not establish any evidence in support of a necessity defense.

¶15 Generally, a defendant is entitled to a jury instruction on any theory that is reasonably supported by the evidence. *State v. Lujan*, 136 Ariz. 102, 104 (1983); *see also State v. King*, 225 Ariz. 87, ¶ 14 (2010). To obtain an instruction, a defendant need only show the "slightest evidence," which our supreme court has explained is a low standard. *King*, 225 Ariz. 87, ¶¶ 14-15. However, "[t]he trial court may preclude a defense when the defendant fails to 'demonstrate he can produce some evidence in support [thereof].'" *State v. Pina-Barajas*, 244 Ariz. 106, ¶ 5 (App. 2018) (alteration in original) (quoting *State v. Medina*, 244 Ariz. 361, ¶ 12 (App. 2018)).

¶16 The necessity defense applies when the defendant "was compelled to engage in the proscribed conduct and the [defendant] had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." A.R.S. § 13-417(A). That is, "the risk of injury must be both imminent and the person at risk must have no reasonable alternative to avoid [an] injury short of violating the law." *Pina-Barajas*, 244 Ariz. 106, ¶ 7. This court has recently emphasized the importance of the imminent injury requirement in both *Pina-Barajas* and *Medina*, explaining the imminence of an injury must be such that reasonable persons would not have had time to pursue lawful alternatives to avoid it. *Id.*; *Medina*, 244 Ariz. 361, ¶ 8 (use of word "imminent" requires threat of injury be immediate). "[I]mminence is at the heart of the defense of necessity—without it, a necessity does not exist." *Medina*, 244 Ariz. 361, ¶ 10. In addition, a defendant may not assert necessity if he "intentionally, knowingly or recklessly placed himself in the situation in which it was probable that [he] would have to engage in the proscribed conduct." A.R.S. § 13-417(B).

¶17 Here, Hankins argues that he "managed" his sexual urges towards children "within the confines of his own home" by possessing and viewing child pornography and that "[his] sexual attractions and urges are not something [he] can intentionally control," but that "[he] can control the way that he reacts to those attractions or urges." Hankins explains "if [he] did not view and masturbate to the child pornography in his home, his attraction to children was beyond his control and something even worse could possibly happen outside of his home." Thus, he appears to argue that he had no reasonable alternative course of conduct he could pursue to avoid

going into public and harming a child and, therefore, that he possessed child pornography out of necessity. He further asserts "a defendant need only show that he engaged in proscribed conduct to avoid a greater injury. In the case of a necessity defense, once that showing is made, reasonableness and imminence is a question for the jury." We disagree.

¶18 First, Hankins asserts no imminent injury, and without an imminent injury, there is no necessity. *Medina*, 244 Ariz. 361, ¶ 10. Second, we reject the notion that he had no reasonable alternatives of lawful action that he could take to avoid harming children. Hankins offers no explanation why, for example, he could not eliminate or greatly reduce the number of instances in which he was around children. Likewise, he offers no explanation why he could not seek professional help for his condition. These are but two examples of reasonable, lawful alternatives to the course of very serious criminal conduct Hankins chose to pursue. Indeed, accepting Hankins's argument would effectively license those with his proclivities to possess child pornography, a result that would require disregarding the nature of his offenses. Arizona classifies both sexual exploitation of a minor and molestation of a child, the crime Hankins claims he was trying to prevent by viewing child pornography, as class two felonies, punishing those offenses under the same statute. A.R.S. §§ 13-3553(C), 13-1410(B), 13-705. Each is a dangerous crime against children. § 13-705(D). Further, a reasonable basis exists for severely punishing the possession of child pornography because offenders victimize the children depicted by "'enabling and supporting the [demand for] production of child pornography, which entails continuous direct abuse and victimization of child[ren].'" *State v. Berger*, 212 Ariz. 473, ¶¶ 20–23 (2006) (quoting *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998)). Thus, we also reject Hankins's argument that possessing child pornography was a lesser harm than molesting a child.

¶19 Lastly, Hankins cannot establish the slightest evidence to support a necessity defense because necessity is unavailable to defendants who intentionally, knowingly, or recklessly place themselves in a situation where they would probably commit the charged offense. *See* A.R.S. § 13-417(B). As noted by the trial court, Hankins intentionally downloaded and possessed child pornography. Further, he admits that, although he does not feel he can control his urges towards children, "[he] can control the way that he reacts" to those urges.

¶20 Because the defense of necessity is unavailable to Hankins, the redacted statements he sought to admit are irrelevant. Therefore, the trial court did not abuse its discretion by redacting the statements.

Notice of Intent to Use Prior Convictions

¶21 Hankins argues the state failed to adequately notify him of its intent to seek enhancement of his sentences based on his prior convictions, and thus his sentences were illegal. Because Hankins failed to object to the state's notice of intent to use his prior convictions, we review for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12-13, 16–21 (2018); *see also Henderson*, 210 Ariz. 561, ¶¶ 19–20 (2005).

¶22 In *Escalante*, our supreme court clarified the nature of review for fundamental error. 245 Ariz. 135. A defendant who fails to object at trial forfeits the right to appellate relief unless he can show trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *Id.* ¶ 21; *see also Henderson*, 210 Ariz. 561, ¶ 20. If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, then he must also separately show prejudice resulted from the error. *Escalante*, 245 Ariz. 135, ¶ 21. If a defendant shows the error was so egregious he could not have received a fair trial, however, then he has shown prejudice and must be granted a new trial. *Id.* "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* (citing *Henderson*, 210 Ariz. 561, ¶ 23).

¶23 The state notified Hankins of its intent to use his prior convictions to enhance his sentences under A.R.S. § 13-703, but not under § 13-705. The state sought and the trial court imposed enhanced sentences under § 13-705. Hankins argues the state's failure to cite § 13-705 in its notice of intent "caused potential prejudice, and his sentences must be reversed as illegal sentences." The state concedes that it did not cite § 13-705 in its notice, but argues it did notify Hankins he was being charged with dangerous crimes against children, and he was therefore on notice that he could be sentenced under § 13-705.

¶24 Before a trial court is permitted to enhance a sentence based on prior convictions, the state must have provided a defendant notice "such that the defendant is not 'misled, surprised or deceived in any way by the allegations' of prior convictions." *State v. Benak*, 199 Ariz. 333, ¶ 16 (App. 2001) (quoting *State v. Bayliss*, 146 Ariz. 218, 219 (App. 1985)). The state must also specifically allege that it seeks enhancement for certain crimes, including dangerous crimes against children. *State v. Francis*, 224 Ariz. 369, ¶ 12 (App. 2010) (citing *State v. Hollenback*, 212 Ariz. 12, ¶¶ 9–11 (App. 2005)). Our supreme court has explained that when the facts needed to support sentencing under an enhancement statute are alleged in the indictment, there is "no resulting prejudice or surprise from the omission of the citation [to the statute]." *State v. Tresize*, 127 Ariz. 571, 574 (1980).

¶25 In *Francis*, we found no error where the state failed to cite A.R.S. § 13-3419—the exclusive sentencing provision for multiple drug offenses committed on separate occasions—but did allege in its indictment all of the facts necessary to satisfy § 13-3419. 224 Ariz. 369, ¶¶ 13–15 (citing *State v. Dominguez*, 192 Ariz. 461, ¶ 8 (App. 1998)). We explained that "[b]ecause the indictment alleged all the facts necessary for the trial court to sentence [the defendant] under § 13-3419, the exclusive sentencing provision for his crimes, [the defendant] presumptively was aware of 'the full extent of the potential punishment that he face[d] before trial.'" *Id.* ¶ 15 (alteration in original) (quoting *State v. Rodgers*, 134 Ariz. 296, 306 (App. 1982)). We also noted that because the defendant was charged with offenses that fell under § 13-3419, the statute "applied to him whether or not the state separately alleged the statute." *Id.* ¶ 14.

¶26 Here, the state properly notified Hankins of its intent to seek to enhance his sentence based on his prior convictions and, in its indictment, alleged the facts necessary to support sentencing him under § 13-705. Specifically, the indictment alleged Hankins possessed several "visual depiction[s] in which a minor, under fifteen years of age, is engaged in exploitive exhibition or other sexual conduct," in violation of § 13-3553(A)(2), (C). Section 13-3553(C) specifically provides that "[s]exual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705." Additionally, the indictment specified that each of the crimes charged were dangerous crimes against children. We therefore conclude that, although the state did not cite § 13-705—the exclusive sentencing provision for sexual exploitation of a minor under fifteen, *see* § 13-3553(C)—Hankins was nonetheless on notice that he was being charged with dangerous crimes against children and that his prior convictions could serve to enhance his sentence. Further, because the state did not offer Hankins a plea agreement, the application of § 13-705 could not have affected whether he proceeded to trial. *See Francis*, 224 Ariz. 369, ¶ 15. We find no error.

Prior Convictions as Predicate Felonies

¶27 Hankins argues the trial court erred in finding his prior convictions for attempted child molestation were predicate felonies for the purpose of sentencing. "A trial court has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, ¶ 5 (App. 2001).

¶28 As noted, the trial court sentenced Hankins under § 13-705(D) after finding his prior convictions constituted predicate felonies under the statute. On appeal, he argues this was error because the state failed to prove

the prior convictions were predicate felonies. Specifically, he asserts his prior convictions were not predicate felonies because although molestation of a child under fifteen is a dangerous crime against children, attempted molestation is not because "it can be committed without the involvement of an actual child under the age of fifteen." In addition to arguing that attempt does not require the victim to be under fifteen, Hankins argues his convictions were not classified as dangerous crimes against children in his 1986 sentencing documents. The state argues the lack of a designation as dangerous crimes against children did not limit the court here from finding the convictions were predicate felonies because § 13-705 does not limit predicate felonies to only those originally designated as dangerous crimes against children.

¶29 A person convicted of sexual exploitation of a minor is subject to the sentencing ranges provided in § 13-705(D), which sets the range at ten to twenty-four years, with a presumptive sentence of seventeen years. This same subsection enhances the range to between twenty-one and thirty-five years, with a presumptive sentence of twenty-eight years for those who have been convicted of a predicate felony. *Id.* Under the statute, "predicate felony" includes "a dangerous crime against children in the first or second degree." § 13-705(Q)(2). Subsection (O) explains "[a] dangerous crime against children . . . is in the second degree if it is a preparatory offense . . . ." § 13-705(O). Further, under subsection (Q)(1): "'Dangerous crime against children' means any of the following that is committed against a minor who is under fifteen years of age: . . . (d) Molestation of a child." § 13-705(Q)(1).

¶30 Hankins was previously convicted of two counts of attempted child molestation for attempting to molest his two-year-old and three-year-old nieces. Under § 13-705(Q)(1), molestation of a child under fifteen is a dangerous crime against children, and subsection (O) plainly and unambiguously provides that a dangerous crime against children is in the second degree if it is preparatory. Attempted molestation of a child is a preparatory offense and therefore a dangerous crime against children in the second degree. *See Wright v. Gates*, 243 Ariz. 118, ¶ 11 (2017) (preparatory crime such as attempt that involves a dangerous crime against children is a second-degree dangerous crime against children under § 13-705).[7] Further, although Hankins's prior convictions were not designated as "attempted molestation of a child *under fifteen years of age*," he was nonetheless

[7]In *Wright*, our supreme court concluded "that solicitation of an enumerated DCAC offense is a second-degree dangerous crime against children." *Wright*, 243 Ariz. 118, ¶ 12.

previously convicted for conduct that fits squarely under § 13-705(Q), (O). Therefore, we find no abuse of discretion in the trial court's imposition of an enhanced sentence.

Disposition

¶31 For the foregoing reasons, we affirm Hankins's convictions and sentences.